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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 9

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re **EBSCO Industries, Inc.**

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Serial No. 75/**772,432**

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Donald H. Zarley of Zarley, McKee, Thomte, Voorhees & Sease for  
EBSCO Industries, Inc.

**Darlene D. Bullock**, Trademark Examining Attorney, Law Office 111  
(Craig Taylor, Managing Attorney).

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Before **Hohein, Holtzman and Drost**, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

**EBSCO Industries, Inc.** has filed an application to  
register the mark "BIGHORN" for "muzzleloading firearms."<sup>1</sup>

Registration has been finally refused under Section  
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground  
that applicant's mark, when applied to its goods, so resembles  
the mark "BIG HORN," which is registered for "folding pocket

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<sup>1</sup> Ser. No. 75/772,432, filed on August 10, 1999, which alleges a date  
of first use anywhere and first use in commerce of December 1, 1998.

knives,"<sup>2</sup> as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but a request for an oral hearing was not submitted. We affirm the refusal to register.

The determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.<sup>3</sup> Although applicant attempts to distinguish the respective marks by arguing that its mark "looks different" from registrant's mark because the former "is one word" while the latter "consists of ... separate words," the marks, when considered in their entirety, are identical in sound and connotation, virtually the same in appearance, and essentially identical in overall commercial impression. Since,

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<sup>2</sup> Reg. No. 1,166,177, issued on August 25, 1981, which sets forth a date of first use anywhere and first use in commerce of September 28, 1979; renewed.

<sup>3</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

in the absence of evidence that such marks are weak and entitled to only a limited scope of protection, it is plain that the contemporaneous use of the marks at issue on similar or otherwise closely related goods would be likely to cause confusion, the focus of our inquiry is accordingly on the similarities and dissimilarities in the respective goods.

Applicant, in this regard, asserts that "the goods of the respective marks are different and are used for different purposes." Applicant's principal argument, however, is that as shown by three third-party registrations, marks containing the terms "BIGHORN" or "BIG HORN" are weak in the field of "hunting related goods and services." Such registrations, which are of record, are for the mark "BIGHORN ANGLER WHERE THE LEGEND BEGAN" and fish design for, in relevant part, "retail stores featuring fishing and hunting equipment" and "arranging and conducting guided fishing, hunting, hiking, camping, photography and film making expeditions," the mark "BIGHORN EXPEDITIONS" and sheep design ("EXPEDITIONS" disclaimed) for "organizing and conducting wilderness river trips and hiking expeditions for others" and the mark "BIG HORN" for "binoculars." According to applicant:

It can be inferred that the reason why all of these marks incorporating "BIGHORN" or "BIG HORN", all for hunting-related goods and services have been allowed to co-register is because of the differences in

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their respective goods and services.  
Therefore, the mere fact that Applicant's  
mark includes the word "BIGHORN" and is for  
goods that are related to hunting is not a  
proper basis upon which to assert that  
confusion is likely. ....

Applicant concludes, therefore, that its mark and goods "are  
distinguishable" and that "'BIGHORN' for muzzleloading firearms  
is no more likely to be confused with 'BIG HORN' for folding  
hunting knives than 'BIG HORN' for folding hunting knives is  
likely to be confused with 'BIG HORN' for binoculars ...."

We agree with the Examining Attorney, however, that  
the respective goods are closely related and that, inasmuch as  
the marks "BIGHORN" and "BIG HORN" have not been demonstrated to  
be weak in the hunting-related field, the contemporaneous use  
thereof in connection with, respectively, muzzleloading firearms  
and folding hunting knives is likely to cause confusion as to  
the source or sponsorship of such goods. As the Examining  
Attorney correctly points out, it is well settled that goods  
need not be identical or even competitive in nature in order to  
support a finding of likelihood of confusion. Instead, it is  
sufficient that the goods are related in some manner and/or that  
the circumstances surrounding their marketing are such that they  
would be likely to be encountered by the same persons under  
situations that would give rise, because of the marks employed  
in connection therewith, to the mistaken belief that they

originate from or are in some way associated with the same entity or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Here, as support for her position that applicant's and registrant's goods are so closely related that their marketing under essentially the same marks is likely to cause confusion, the Examining Attorney has made of record four use-based third-party registrations of marks which are registered for "firearms," on the one hand, and "knives," including "hunting knives," "folding knives" and/or "sport(s) knives," on the other. While the third-party registrations are admittedly not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. Moreover, as the Examining Attorney accurately observes, the specimens of use for applicant's goods indicate that, among the features for its muzzleloading firearms, are "[f]ully adjustable metallic hunting sites." It is clear, therefore, that applicant's goods, like registrant's folding hunting knives, are

suitable for use in hunting and, as noted by the Examining Attorney, "may be used in conjunction with one another."

In light of such evidence, we agree with the Examining Attorney that applicant's muzzleloading firearms and registrant's folding hunting knives are closely related goods which would be sold to the same classes of purchasers, namely, hunters, outdoorsmen and other sportsmen, through the same channels of trade, including gun shops, sporting goods stores, and retail outdoor outfitters. The Board, in the analogous case of *In re Precise Imports Corp.*, 193 USPQ 794, 796 (TTAB 1976), in fact has so found, stating in support of its holding that contemporaneous use of the mark "DEERSLAYER" is likely to cause confusion that:

In this case, the goods involved are pocket, hunting and sporting knives vis-à-vis rifles and shotguns. There is no question but that these products may be found in the same stores such as sporting goods stores and that they may be purchased by the same purchasers. .... However, the relationship between the products here involved extends beyond common purchasers and common trade channels. There is a definite relationship between these goods in that sportsmen engaged in hunting pursuits would more than likely carry both a rifle or shotgun and a hunting or sporting knife and may well purchase both types of products at the same time in preparation for their trips. And if they were to encounter both of these products under the same or similar marks, it is difficult to perceive how confusion as to the origin of these goods could be avoided. ....

While the Board in *Precise Imports*, supra, went on to acknowledge that a "viable argument could be made" in the case of where so many different entities have been shown to have used and registered marks consisting of or including the same term that "the trademark significance [there]of ... has been so diminished by the multiple uses and registrations thereof that a party's rights therein might be restricted to the specific goods on which he has used and registered the mark," the Board found that in the case of the "DEERSLAYER" mark that "there is nothing in the record to disclose any proliferation of registrations in this term in the sporting goods or related fields." Likewise, we agree with the Examining Attorney that, in this case, the record is insufficient to establish that marks consisting of or including the terms "BIGHORN" or "BIG HORN" are weak in what applicant characterizes as "the hunting-related" field. In particular, we concur with the Examining Attorney that "[t]wo of the [third-party] registrations presented by the applicant contain additional wording, convey different commercial impressions, and are therefore distinguishable from the cited mark and the applicant's mark." While the Examining Attorney also asserts that "[t]he remaining [third-party] registration [for the mark] BIGHORN for binoculars is irrelevant because the goods are not closely related," we note that there simply is no

evidence to establish that binoculars bear the same definite relationship to muzzleloading firearms or folding hunting knives that the latter two products share. A single third-party registration for the mark "BIGHORN," moreover, scarcely can be said to constitute a proliferation of "BIGHORN" or "BIG HORN" marks such that those marks must be regarded as weak and therefore entitled to but a narrow scope of protection.

Furthermore, and in any event, the Examining Attorney also properly points out with respect to the third-party registrations upon which applicant relies that, as stated in *AMF Incorporated v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973):

[L]ittle weight is to be given such registrations in evaluating whether there is likelihood of confusion. The existence of these registration is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.

Finally, as the Examining Attorney additionally observes, there is nothing in the record which indicates that the marks "BIGHORN" and "BIG HORN" are weak in the sense that they are highly suggestive of the goods with which they are associated. Such marks, instead, appear to be fanciful and hence strong marks.



We accordingly conclude that consumers and potential customers, who are familiar or acquainted with registrant's "BIG HORN" mark for its folding hunting knives, would be likely to believe, upon encountering applicant's virtually identical "BIGHORN" mark for its muzzleloading firearms, that such closely related products emanate from, or are sponsored by or associated with, the same source. See, e.g., In re Precise Imports Corp., supra.

**Decision:** The refusal under Section 2(d) is affirmed.